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Greg Curtis; West Jordan City Prosecutor; Attorney for Appellee.
Joan C. Watt; Susan M. Denhardt; Salt Lake Legal Defender Association; Attorneys for Appellant.

Recommended Citation
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BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH (by West Jordan City) Plaintiff/Appellee v BRUCE S. ROBERTSON Defendant/Appellant	Case No. 930728-CA Priority No. 10

BRIEF OF APPELLEE

An Interlocutory Appeal From
the Third Judicial Circuit Court
for Salt Lake County, State of Utah

Honorable Edward A. Watson, Circuit Court Judge

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FILED
Utah Court of Appeals

JUL 26 1994

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over interlocutory appeals from any court of record in criminal cases, except those involving a first degree or capital felony. Utah Code §78-2a-3(2)(e). Mr. Robertson's petition for interlocutory review was granted by this Court on December 22, 1993.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue before the court is whether §10-3-928 of the Utah Code, which expressly allows city attorneys to prosecute state infractions and misdemeanors in the name of the State of Utah violates Article VIII, Section 16 of the Utah Constitution?

THE STANDARD OF REVIEW

A trial court's denial of a motion to dismiss based upon its conclusion that the challenged statute is constitutionally valid

presents a question of law. Accordingly, the Court of Appeals reviews that decision under a correction-of-error standard, granting no particular deference to the trial court. West Valley City v. Streeter, 208 Utah Adv. Rep 92, (Utah App. 1993).

DETERMINATIVE PROVISIONS

Article VIII, Section 16, of the Utah Constitution provides:

> The Legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah.

The original action against Mr. Robertson was brought pursuant to the authority provided to the prosecutor under Utah Code §10-3-928 which states:

> In cities with a city attorney, the city attorney may prosecute violations of city ordinances, and under state law, infractions and misdemeanors occurring within the boundaries of the municipality and has the same powers in respect to the violations as are exercised by a county attorney, including, but not limited to, granting immunity to witnesses. The city attorney shall represent the interests of the state or the municipality in the appeal of any matter prosecuted in any trial court by the city attorney.

The Legislature added a technical amendment to §10-3-928 in 1993 to include district attorneys, however, the operative language allowing city attorneys the authority to prosecute state infractions and misdemeanors has remained the same.

STATEMENT OF THE CASE

I. Nature of the Case

Defendant, Bruce S. Robertson, petitioned for interlocutory appeal from the ruling of the Third Circuit Court, State of Utah,

denying Robertson's motion to dismiss an Information filed against him based upon the alleged unconstitutionality of Utah Code §10-3-928. In denying Robertson's motion to dismiss the trial court upheld the constitutionality of Utah Code §10-3-928, which grants authority to cities with city attorney's to prosecute state infractions and misdemeanors.

II. Course of the Proceedings and Disposition Below

West Jordan City brought four charges against Bruce S. Robertson in the Third Circuit Court, West Valley Department, which are: (1) Driving Under the Influence of Alcohol in violation of Utah Code Ann. §41-6-44; (2) Driving on Revocation in violation of Section 41-2-136.3; (3) Reckless Driving in violation of Section 41-6-45; and (4) Fleeing from a Police Officer in violation of Section 41-6-13.5.

Robertson was arraigned and Susan Denhardt, Legal Defenders Association, was appointed to represent him. Robertson filed a motion to dismiss claiming that the city attorney did not have the authority to prosecute state code charges. The trial court denied Robertson's motion to dismiss finding that the defense had failed to prove beyond a reasonable doubt that Utah Code §10-3-928 is unconstitutional and holding that §10-3-928 does fit within the framework of the Utah Constitution. This Court granted Robertson's petition for interlocutory review upon the trial court's denial of Robertson's motion to dismiss.

SUMMARY OF THE ARGUMENT

Article VIII, Section 16 of the Utah Constitution directs

the Utah Legislature to establish a system of public prosecutors who have primary responsibility for the prosecution of criminal actions bought in the name of the State of Utah. By the use of the word primary the constitutional language mandates that there are other prosecutors who also have responsibility to prosecute actions in the name of the State of Utah. City attorneys have been fulfilling this role for almost twenty years. By enacting Utah Code §10-3-928 the Legislature slightly expanded the role of city attorneys in the prosecution arena and established public policy by further defining the prosecution system as the Legislature is directed to do pursuant to the constitutional language.

ARGUMENT

PRINCIPLES OF CONSTITUTIONAL ADJUDICATION

A basic principle of constitutional adjudication is that the courts should presume statutes to be constitutionally valid. Utah Associated Municipal Power System v. Public Service Commission, 789 P.2d 298 (Utah 1990). Also, it is a fundamental principle of judicial review that where possible, the court refrain from deciding constitutional questions, unless required to do so. State by and through Division of Consumer Protection v. Rio Vista Oil, Ltd, 786 P.2d 1343 (Utah 1990).

The party attacking the constitutionality of the statute has the burden of proof in establishing the statutes unconstitutionality. Utah Associated Municipal Power System v. Public Service Commission, 789 P.2d 298 (Utah 1990). Utah courts

have made it abundantly clear that the reviewing court, when faced with a "constitutional" question, has "a duty" to construe the statute to avoid constitutional infirmities whenever possible. Mountain States Telephone and Telegraph Company v. Garfield County, 811 P.2d 184 (Utah 1991). A statute will not be held to be unconstitutional if any reasonable basis can be found to bring it within constitutional framework. State v. Davis, 787 P.2d 517 (Utah Ct. App. 1990). If there are two alternative statutory constructions available---one rendering the statute constitutional and the other unconstitutional---the former construction should be adopted. Mountain States Telephone and Telegraph Company v. Payne, 782 P.2d 464 (Utah 1989). The court will not invalidate the statute unless it is "clearly in conflict" with the Constitution. State v. Murphy, 674 P.2d 1220 (Utah 1983). The court is to afford the challenged statute every presumption of validity, so long as there is a reasonable basis upon which both provisions of the statute and the mandate of the Constitution may be reconciled. Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District, 690 P.2d 562 (Utah 1984).

Past court decisions have framed the standard of proof required before a statute may be declared to be unconstitutional as "clearly and palpably" unconstitutional. See Ellis v. Department of Social Services of the Church of Jesus Christ of Latter-day Saints, 615 P.2d 1250 (Utah 1980). Recently the Utah Court of Appeals has declared that a statute will not be struck

down unless it appears to be unconstitutional beyond a reasonable doubt." State v. Davis, 787 P.2d 517 (Utah Ct. App. 1990). In clarifying and restating the burden to be met by one who challenges a statute on constitutional grounds the Utah Supreme Court stated that **"The act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality".** Society of Separationists v. Whitehead 227 Utah Adv. Rep 67 (Utah App. 1993) When applied against the foregoing jurisprudential principles, defendant's arguments fail.

ATTORNEY GENERAL'S INFORMAL OPINION 92-16

Robertson, relying almost exclusively on Informal Opinion #92-16, dated 4 December 1992, issued by the Attorney General's Office, has moved to have the charges filed against him dismissed. A signed copy of Informal Opinion #92-16 is contained in Addendum A. Informal Opinion 92-16 concluded that Utah Code §10-3-928, was unconstitutional. In reaching the conclusion that Utah Code §10-3-928 is unconstitutional the Attorney General's Opinion does not even refer to a single Utah appellate court decision concerning the "constitutionality" of an act. Rather, the opinion concludes that all prosecutions in the name of the State of Utah must either be by an elected prosecutor or by a prosecutor under the direction and supervision of an elected prosecutor.

The Attorney General's Opinion ignores the constitutional language of Article VIII, Section 16 that mandates to the Legislature to establish a system of public prosecutors who have

primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah. The opinion focuses entirely upon court decisions from other jurisdictions without recognizing or acknowledging that city attorneys have had statutory authority to prosecute in the name of the State of Utah for nearly twenty years. Such selective, result-oriented jurisprudence is inappropriate in this setting, particularly when the constitutionality of a statute is at issue.

This case is distinguishable from the cases cited in the Informal Opinion and Robertson's brief. Defendant cited Murphy v. Yates, 348 A.2d 837, 841 (Md. Ct. App. 1975), a Maryland case, which decided whether a prosecutor created by state law could prosecute when those same duties were given to the State's Attorneys. However, the Maryland Constitution was worded differently, and the history of the Attorney General and State's Attorneys were much different than that of Utah's prosecutors. The Maryland State's Attorneys derived their powers through constitutional revision from those granted earlier to the Attorney General: "It shall be the duty of the attorney general to prosecute and defend . . ., all cases now depending, ..." Murphy v. Yates, 348 A.2d 837, 841 (Md. Ct. App. 1975) (declaring a legislative act unconstitutional which created an independent state prosecutor's office having some of the same duties as the State's Attorney).

However, Judge Levine, in dissent, focused on the constitutional language granting the State's Attorney power ("as

shall be provided by law") and said that the majority was wrong because an overwhelming number of jurisdictions having such language permitted the legislature to fully prescribe such duties including diminishing them. Further, that the act was not unconstitutional because it did not cause the office of State's Attorney to be left without its "substantial duties, responsibilities and rights."

Additionally, Robertson, and the Attorney General's Opinion cited a Rhode Island case which considered whether proposed legislation would create a conflict with the constitutional powers of the Attorney General. The court held that providing a special prosecutor with "full prosecutorial authority" would be a transfer of the Attorney General's "fundamental powers." However, that court based its decision largely on the following: "It is well settled in this state that the Attorney General is the only state official vested with prosecutorial discretion." In re House of Representatives, 575 A.2d 176, 179 (R.I. 1990) (holding that proposed legislation violated a constitutional provision concerning the Attorney General's duties and powers).

Lastly, Robertson, and the Attorney General's Opinion cited a North Dakota case which considered whether the enforcement of liquor laws could be performed by an appointed office. That court said that to interpret the constitution it must be considered in the "light of contemporaneous history - of conditions existing at and prior to its adoption." Ex parte Corliss, 114 N.W. 962, 967 (N.D. 1907). The ultimate decision of

the North Dakota court was that an office created by the constitution could not be eroded in its power by an appointed office. However, the court made it clear that the history and the intent of the framers were important considerations. "In other words, the spirit as well as the letter of the instrument, must be given effect." Id. at 967.

Concerning the application of constitutional cases from other states, Justice Oaks of the Utah Supreme Court has observed:

> It makes clear that the question posed here turns on a construction of disparate provision of the constitutions and statutes of the various states. In this area, judicial opinions from other states have limited value as precedents, except insofar as they identify the public policy consideration that illuminate constitutional and statutory construction. Wilson v Manning, 657 P.2d 251 at 252 (Utah 1982).

Unlike the cases cited by Robertson, Utah's Legislature is directed to provide for a system of public prosecutors who have primary responsibility for the criminal actions brought in the name of the state of Utah. When the new language of the Utah Constitution was adopted the Legislature was fully aware that city attorneys have historically had prosecutorial authority which they shared with elected prosecutors. Utah's Constitution does not grant exclusive authority to elected prosecutors, nor deprive the Legislature of their power to establish the state's prosecutorial system.

ARTICLE VIII, SECTION 16 CONTEMPLATES ELECTED AND NON-ELECTED PROSECUTORS

The defendant, in arguing that the clear language of Utah

Code §10-3-928 is unconstitutional, focuses merely upon the word "elected" in Article VIII, Section 16, of the Utah Constitution and refuses to consider the language of the entire section. The defendant argues that having an elected prosecutor maintains the integrity of the prosecutorial role and implies that an appointed prosecutor may be susceptible to outside pressures. The court should note that in the federal district attorney's office, the largest single prosecutorial system, federal district attorney's are appointed, not elected. Contrary to the underlying theme of defendant's argument, public policy does not dictate that all prosecutors be elected.

Article VIII, Section 16, of the Utah Constitution provides:

> The Legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah.

The language of Article VIII, Section 16, states that public prosecutors shall have the primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah. Without considering the distinction between what is the primary responsibility and what would be the secondary responsibility, or nonprimary responsibility, defendant relies upon the Attorney General's Informal Opinion and asserts that a problem arises because city attorneys are not under the supervision or control of elected public prosecutors. Defendant ignores the clear language of Article VIII, Section 16 and argues

that all prosecutions must be under the direction of an elected prosecutor. Defendant fails to address the idea that the Legislature provided for a system of prosecution that did not require all prosecutors to be under the control or supervision of the Attorney General, or an elected county or district attorney.

Title 77, Chapter 10(a) of the Utah Code, Grand Jury Reform, allows for a district court judge serving as the supervising judge on the five-judge grand jury panel to appointment a special prosecutor if the supervising judge follows certain criteria. The special prosecutor is neither elected, nor supervised by elected prosecutors. Plaintiff recognizes there is a distinction between a special prosecutor and a city attorney. However, the illustration points out that the absolute strict construction defendant argues for in having all prosecutors elected or supervised by an elected prosecutor would make several provisions of the Utah Code unconstitutional.

In deciding whether Utah Code §10-3-928 is unconstitutional the court must determine who functions in the role of a public prosecutor. Then, secondly, if the public prosecutor does not have complete responsibility, then what other prosecutors, if not public prosecutors, have responsibility to prosecute criminal actions brought in the name of the State of Utah?

Article VIII, Section 16, begins with the phrase stating that "the legislature shall provide for a system of public prosecutors who shall have the primary responsibility for the prosecution of criminal actions . . . ." First, "the legislature

shall provide . . . ." clearly indicates that the framers did not intend for the Constitution to mandate this system, but rather that the Legislature should create this system by statute. Second, that these prosecutors shall have "primary responsibility" indicates that the framers envisioned a secondary prosecuting responsibility.

The Legislature has "provided for" the "system" by designating that county attorneys or district attorneys of the various counties or districts, respectively, to be the public prosecutorial agency with the primary responsibility to prosecute state cases. However, that designation is not absolute in nature. The legislatively adopted system provides for the "sharing" of this prosecutorial responsibility. Indeed, §17-18-1(1)(a), Utah Code, provides:

> (1) In each county which is not within a prosecution district, the county attorney is a public prosecutor and shall:
>
> (a) conduct on behalf of the state all prosecutions for public offenses committed within the county, except for prosecutions undertaken by the city attorney under Section 10-3-928 and appeals from them; . . . .
>
> (2) The county attorney:
>
> (a) shall appear and prosecute for the state in the district court of the county in all criminal prosecutions; . . .

Also, §17-18-1.7(1)(a) and (2)(a) Utah Code, follows the same language in describing the powers and duties of the district attorneys.

> (1) The district attorney is a public prosecutor and shall:
>
> > (a) prosecute in the name of the state all violations of criminal statutes of the state;. .
> >
> > (c) conduct on behalf of the state all prosecutions for public offenses committed within the county, except for prosecutions undertaken by the city attorney under Section 10-3-928 and appeals from them; . . . .
>
> (2) The district attorney shall:
>
> > (a) appear and prosecute for the state in the district court all criminal actions for violation of state law;. . .

If the position of Robertson, and the Attorney General's Opinion, is to be followed, portions of these statutes would be unconstitutional. Other potentially "unconstitutional" statutes are §76-10-1215 (adopted in 1977, authorizing city attorneys to prosecute state law obscenity violations, including felonies), §41-6-44.8 (originally adopted in 1983, authorizing city attorneys to prosecute traffic code violations, including enhanced DUI, driving on revocation and/or suspension, and automobile homicide) and §76-10-1308 (authorizing city attorneys to prosecute prostitution violations). If the court accepts the interpretation the defendant argues for several separate statutes could be "unconstitutional."

In lieu of such a drastic result, could there not be another interpretation of Article VIII, Section 16 which would give validity to all of the statutes---of which two actually preceded

the adoption, in 1984, of the constitutional amendment? We submit that such an interpretation is found within the text of Article VIII, Section 16 itself. The Section specifies that "(t)he Legislature shall provide for a system of public prosecutors . . . ." Indeed, the Legislature has complied with that obligation: It has established a "system", wherein the county and district attorneys have "primary responsibility" for conducting the criminal prosecutions. However, if the county attorney or district attorney has "primary responsibility" to conduct the criminal prosecutions, could it not be that there must be another prosecutor which might have "secondary responsibility" for those *prosecutions? That prosecutor is the city attorney.*

Defendant argues that primary responsibility means chief or principal control or authority over the prosecution. However, defendant again circumvents the word **primary.** Who did the Legislature have in mind when they used the word primary rather than sole or exclusive responsibility? The Legislature intended to give non-primary responsibility to certain prosecutors to prosecute actions in the name of the State of Utah. City attorneys are the prosecutors the Legislature intended to fulfill that secondary role.

The "system" devised by the Legislature is similar, in certain aspects, to "federalism:" The prosecutorial power is divided between two prosecutorial agencies. This approach is consistent with the "primary responsibility" language and allows for an interpretation which gives meaning to the term "primary".

Robertson's interpretation of that phrase **substitutes a new word** (i.e. "sole" or "exclusive" responsibility) in the phrase. Such an interpretation does violence to the whole purpose of the 1984 constitutional amendment. That amendment was not intended to render "unconstitutional" those statutes---such as §41-6-44.8 (adopted 1983) and §76-10-1215 (adopted 1977)---which were already in effect and which then allowed municipal attorneys to handle state prosecutions.

Similarly, the 1984 constitutional amendment is not offended by §10-3-928, §17-18-1(a)(1) or §17-18-1.7(1)(a). Therefore, Utah Code Ann. §10-3-928 does not violate Article VIII, Section 16 of the Utah Constitution.

Robertson has failed in his burden to prove <u>beyond a reasonable doubt</u> that the statute, presumed to be constitutional, is "unconstitutional." Robertson focuses merely upon the word "elected" as though it were the most important word, to dominate the entire provision. With regard to the "elected" issue, Robertson's argument is merely a smokescreen, not focusing upon the correct issue.

The 1984 constitutional amendment was proposed to the electorate with the endorsement of the Legislature and various prosecuting agencies, including but not limited to the Utah Association of Counties, the Statewide Association of Prosecutors (SWAP) and the Attorney General. The requirement that there be <u>an</u> "elected" prosecutor was very important, for the following reason: The "primary" prosecutor had to be elected in order to

insure that there was an independent prosecutor who could zealously undertake that prosecution without fear of being fired if he prosecuted the wrong person, such as another government official, whether elected or appointed.

The provision requiring that public prosecutors be elected does not require that ALL prosecutors be elected. The Legislature has "provided" the "system" of "public prosecutors," in which the "elected" county or district attorney and/or the appointed city attorney, under the provisions of §10-3-928, could prosecute state statute violations. If at any time a city attorney fails to prosecute an individual for an alleged violation then the appropriate county or district attorney can prosecute the alleged violations. However, city attorneys can not prosecute all violations of state law, only misdemeanors and infractions. This distinction delineates between public prosecutors with primary responsibility and city attorneys who have a secondary responsibility and are only allowed to prosecute infractions and misdemeanors.

If the public feels a city attorney is failing to prosecute certain violations of the law then the public can request that the county or district attorney prosecute the violations. This is the safe guard the public has against city attorneys not fulfilling their prosecutorial responsibilities. However, if a county or district attorney fails or refuses to prosecute certain violations then the public must elect a different county or district attorney.

Defendants arguments and those arguments put forth by the Attorney General's Opinion 92-16 are not concerned that the city attorneys will fail to prosecute violations of the law. Rather, the arguments seem to focus on the fact that city attorneys will not be supervised by the Attorney General or county attorney. Perhaps this is exactly what the Legislature intended when they amended §10-3-928 giving municipal attorneys autonomy from state and county government.

The Legislature saw the need to authorize municipal attorneys to prosecute state misdemeanors and infractions. The specific purpose of the Legislature's intent behind the 1991 amendment of §10-3-928 is found in the title to House Bill 436 [Trial Court Organization and Jurisdiction]: "An Act . . . **increasing authority of city prosecutors**. . ." Emphasis added. Therefore, we request this court to uphold the trial court's denial of Robertson's motion to dismiss and find that Utah Code §10-3-928 is constitutional.

CONCLUSION

Robertson's argument requires that this court accept his interpretation of the wording of Article VIII, Section 16; however, the weight of evidence is clearly in favor of the State. Historically, the communities of Utah have been represented by both appointed and elected prosecutors. It has been the Legislatures intent in passing several statutes, including §10-3-928, allowing city attorneys to prosecute actions in the name of the state, to have both appointed as well as elected prosecutors

to be part of Utah's system of prosecutors.

Robertson has not met his burden of establishing, by proof beyond a reasonable doubt, that the statutes, specifically §10-3-928, authorizing the municipal attorney-directed prosecution of the alleged state statute violations are unconstitutional. On the contrary, there is at least one other reasonable interpretation to Article VIII, Section 16 which gives meaning and significance to the entire provision. This Court should rule that Robertson has not met his burden of persuasion. The Court should follow its principles of constitutional adjudication regarding the presumption of validity and declare that §10-3-928, is constitutional and that the instant prosecution may proceed.

Respectfully submitted this 26th day of July, 1994.

WEST JORDAN CITY ATTORNEY'S OFFICE

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Assistant West Jordan City Attorney
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CERTIFICATE OF SERVICE

I certify that I caused eight true and correct copies of the foregoing Brief of Appellee, State of Utah, to be delivered to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lak City, Utah 84102, and four copies to:

Joan Watt, Esq.
Salt Lake Legal Defender Ass'n
Attorney for Appellant
Bruce S. Robertson
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Dated this 26 day of July, 1994.

GREG J. CURTIS

ADDENDUM A

OFFICE OF THE ATTORNEY GENERAL

STATE OF UTAH

PAUL VAN DAM
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JOHN F. CLARK
Counsel to the Attorney General
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Department of Appeals & Opinions

JOSEPH F. TESCH
Chief Deputy Attorney General
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December 4, 1992

Mr. David E. Yocom
Salt Lake County Attorney
2001 South State Street
Salt Lake City, Utah 84190-1200

Subject: Informal Opinion No. 92-16
H.B. 436 - Authority of City Attorneys
To Prosecute Under State Law

Dear Mr. Yocom:

On behalf of the Advisory Board of the Statewide Association of Prosecutors, you have asked our opinion concerning the constitutionality of a portion of House Bill 436 (1991 General Session) which amended Utah Code Ann. § 10-3-928 and which statutorily authorized city attorneys to prosecute violations of certain state laws occurring within the boundaries of their municipalities.

Noting that city attorneys are not elected, you asked whether this provision violates Article VIII, Section 16 of the Utah Constitution which provides that public prosecutors shall be elected and shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah. You indicated that before the passage of H.B. 436, city attorneys had been limited in their prosecution duties to prosecuting under city ordinances or specific state statutes as provided by the legislature, or under authority granted to them by deputization from county attorneys.

Issues and Short Answers

PRIMARY ISSUE: Is the provision in Utah Code Ann. § 10-3-928 which authorizes city attorneys to prosecute crimes under state law constitutional?

SHORT ANSWER: No.

SECONDARY ISSUE: Are convictions which have been obtained by city prosecutors pursuant to section 10-3-928 nevertheless valid?

SHORT ANSWER: Yes.

Analysis

As amended, Utah Code Ann. § 10-3-928 reads:

> **Attorney duties -- Deputy public prosecutor**
>
> In cities with a city attorney, the city attorney may prosecute violations of city ordinances, and under state law, infractions and misdemeanors occurring within the boundaries of the municipality and has the same powers in respect to the violations as are exercised by a county attorney, including, but not limited to, granting immunity to witnesses . . .

Article VIII, Section 16 of the Utah Constitution provides as follows:

> The Legislature shall provide for a system of public prosecutors *who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah* and shall perform such other duties as may be provided by statute. *Public prosecutors shall be elected* in a manner provided by statute, and shall be admitted to practice law in Utah... [emphasis added.]

The Constitution thus provides that public prosecutors shall have primary responsibility for the prosecution of state criminal actions, and that such prosecutors must be elected. The legislature has provided for such a system of elected public prosecutors by establishing county attorneys, who are elected, and by vesting prosecutorial authority in the Attorney General, who is also elected.[1]

---

[1]Utah Code Ann. § 67-5-1(5) vests the Attorney General with supervisory powers over county attorneys of the state in all matters pertaining to the duties of their offices. There is no such provision giving the Attorney General supervisory authority over city attorneys.

Also, a deputy county attorney may act for the county attorney, without violating the constitutional provision that elected public prosecutors have *primary responsibility*, as a county attorney can always review a deputy's recommendation and substitute the county attorney's own decision for that of the deputy. State v. Winne, 189 N.W. 119, 120 (S.D. 1922) ("a deputy state's attorney does not fill a new office created by statute, and is not endowed with functions usurped from those of the constitutional officer.")

The problem with section 10-3-928 is that it gives broad general authority to city attorneys who are appointed rather than elected (Utah Code Ann. § 10-3-902) to exercise the powers of public prosecutors by prosecuting infractions and misdemeanors *under state law*; that is, prosecuting in the name of the State of Utah. Thus, under section 10-3-928, a city attorney derives the power to prosecute state offenses directly from the statute, rather than by being a delegee of, and under the supervision of, a public prosecutor.

Indeed, the statute grants prosecutorial authority to a city attorney whether or not the county attorney consents. The city attorney could decide to prosecute a person whom the county attorney would not have prosecuted, or to grant immunity to one to whom the county attorney would not have granted immunity, or to prosecute as a misdemeanor a case that the county attorney would have prosecuted as a felony. These types of decisions are the essence of prosecutorial discretion. See 27 C.J.S. District and Prosecuting Attorneys § 14(1). State v. Bell, 785 P.2d 390, 402 (Utah 1989) (prosecutors are given broad discretion in determining whether and in what manner to prosecute a case). Further, since county attorneys are elected, the people have the authority to vote the public prosecutor out of office should they be dissatisfied with the decisions of the prosecutor.

In Ex Parte Corliss, 114 N.W. 962 (N.D. 1907), a state statute created an appointed office of "enforcement commissioner" and invested the commissioner with all of the common-law and statutory powers of elected state's attorneys in the enforcement of state liquor laws. The court found the statute unconstitutional, stating that it "violates those provisions of our state Constitution by which the people reserved the right to have the public functions which are attempted to be conferred upon the officers created by said act discharged by officers of their own selection." Id. at 963. The court also stated that "if these constitutional offices can be stripped of a portion of the inherent functions thereof, they can be stripped of all such functions, and the same can be vested in newly created appointive officers, and the will of the framers of the Constitution thereby thwarted." Id. at 964.

Numerous jurisdictions have followed the Corliss court's rationale. For instance, in Murphy v. Yates, 348 A.2d 837 (Md.

App. 1975), the court struck down a statute which created the office of state prosecutor as an independent unit in the executive branch because it constituted an invasion of the powers and duties of the state's attorneys and the Attorney General, in violation of the Maryland Constitution.

The Maryland court enunciated the principle that "if an office is created in the Constitution, and specific powers are granted or duties imposed by the Constitution, . . . the position can neither be abolished by statute nor reduced to impotence by the transfer of duties characteristic of the office to another office created by the legislature. [citations omitted] We regard this as but another facet of the principle of separation of powers, guaranteed by [the Maryland Constitution]. Id. at 846.

The court went on to state:

> We do not find persuasive the contention that the duties imposed on the Special Prosecutor are concurrent with the powers of the State's Attorneys. The simple fact is that the Special Prosecutor's power to initiate an investigation and to commence prosecution is a State's Attorney's most awesome discretionary power: to determine whether or not to prosecute. . . . Praiseworthy through the purpose of the General Assembly might have been in enacting the legislation, the result can only be validly achieved by a constitutional amendment.

Id. at 848.

Similarly, in the case of In re House of Representatives, 575 A.2d 176 (R.I. 1990), the Supreme Court of Rhode Island determined that proposed legislation, which would have created a procedure for *appointing* a special prosecutor to investigate and prosecute certain crimes, violated that state's constitution by severely infringing upon the fundamental constitutional powers of the elected Attorney General. Id. at 179-180.

We find the authorities outlined above to be persuasive and well-reasoned. Any person who prosecutes in the name of the State of Utah must, according to the Utah Constitution, either be elected or be responsible to a public prosecutor who is elected (that is, responsible to one who has "primary responsibility" for the prosecution of criminal actions brought in the name of the State of Utah). A city attorney prosecuting state criminal actions by virtue of section 10-3-928 is neither an elected prosecutor nor responsible to an elected prosecutor. Indeed, each prosecutorial decision made by the non-elected city prosecutor diminishes the

authority of the elected county attorney to decide otherwise. Consequently, section 10-3-928, which purports to create the power to prosecute under state law in a person who is neither elected nor responsible to an elected prosecutor, violates the Utah Constitution.

While city attorneys cannot derive power to prosecute in the name of the State of Utah directly from statute, county attorneys are empowered to deputize city attorneys to conduct such prosecutions. For example, Utah Code Ann. § 78-5-111(2) provides that a county attorney "may appoint city prosecutors as deputies to prosecute state offenses in municipal justice courts." Therefore, if a county attorney deputizes a city attorney, then the city attorney derives the power to prosecute state offenses from the county attorney, and is subordinate to and responsible to the county attorney, an elected prosecutor.

Effect Upon Prior Convictions

The foregoing opinion raises the issue of what effect, if any, the opinion may have upon prior convictions obtained by city attorneys acting pursuant to section 10-3-928. We believe that any determination that section 10-3-928 is unconstitutional would not void any otherwise valid conviction.

In State v. Gambrell, 814 P.2d 1136 (Utah App. 1991), the defendant claimed that the County Attorney who prosecuted him never filed a bond as required by statute, and that he was thus without authority to initiate the charges, invalidating the trial court's jurisdiction to hear the case. The Utah Court of Appeals disagreed, upholding defendant's conviction, stating:

> "Under the *de facto* doctrine the acts of one who assumes official authority and exercises duties under color of a valid appointment or election are valid where the community acquiesces to his authority. The mere failure to comply with a technical requirement does not void the official's actions as to third parties and the public. The acts are valid if in the interests of justice."

Id. at 1139 (citations omitted). Accord. State v. Sawyers, 819 P.2d 806, 808 (Utah App. 1991).

A city attorney prosecuting pursuant to section 10-3-928 would have been acting "as one who assumes official authority and exercises duties under color of a valid appointment where the community acquiesces to his authority." Ibid. Further, in the absence of section 10-3-928, the city attorneys could have been

deputized by county attorneys to try cases in the name of the State of Utah. Hence, the fact of not having been appointed by a county prosecutor to try these cases can be viewed as a "mere technical requirement which does not void the official's actions as to third parties and the public." Ibid.

Third, the convictions obtained by the city attorneys are clearly "in the interests of justice." We believe that Gambrell is controlling in this instance, and that convictions obtained by city attorneys while prosecuting in the name of the State of Utah would, if otherwise valid, not be invalid due to having been obtained by a city attorney.

Finally, case law from many other jurisdictions supports the proposition that convictions are valid even though obtained by prosecutors who may have had defective appointments.

In People v. Kempley, 271 P. 478 (Cal. 1928), the court held that special counsel for the state who assumed and exercised duties of public officer under authorized appointment was an officer *de facto* though not taking oath of office.

In People v. Montoya, 616 P.2d 156 (Colo. App. 1980), the defendant contended that his conviction was void because the case was prosecuted by deputies of the Attorney General's Office whose appointments as special prosecutors for the District Attorney were invalid, and therefore the trial court lacked jurisdiction. The court held, however, that "even if ineligible as special prosecutors, the members of the Attorney General's office acted as *de facto* officers whose authority to prosecute [the defendant] may not now be challenged." Id. at 162. (citing Glavino v. People, 224 P. 225 (Colo. 1924).

In State v. Jaramillo, 749 P.2d 1 (Idaho App. 1987), the defendant challenged the validity of the appointment of the deputy prosecuting attorney. The court held that under the authority of Gasper v. District Court, 264 P.2d 679 (Idaho 1953) [which held, inter alia, that where a duty or power is conferred by law on a prosecuting attorney in this state, the same duty or power is conferred upon his deputies], the prosecutor was, at the time relevant to this case, at least a *de facto* deputy prosecuting attorney. In essence, the court said that if an appointment of the deputy prosecuting attorney was not filed, he was at least a *de facto* deputy prosecuting attorney.

In Gragg v. State, 201 N.W. 338 (Neb. 1924), a county attorney appointed a private attorney to undertake a prosecution, but the assistant did not file a bond or take the official oath. The court affirmed the conviction, stating that the assistant "held himself out as county attorney and performed the duties pertaining to this office and was recognized by the public as county attorney, so that

he was county attorney *de facto*." Id. at 340.

In Pamanet v. State, 182 N.W.2d 459 (Wisc. 1971), a district attorney elected in one county served two counties. Though his acts were arguably illegal as to the second county, the court held that he was, at the very least, an officer *de facto*, and even if his acts were illegal as to the second county's electors, such acts were still valid.

Conclusion

That portion of Utah Code Ann. § 10-3-928 which purports to empower city attorneys, who are not elected prosecutors, to prosecute state criminal actions, and to do so without being responsible to any elected prosecutor concerning such state criminal actions, violates the Utah Constitution.

Notwithstanding the constitutional deficiency of the statute, criminal convictions which have been obtained by city prosecutors pursuant to section 10-3-928 are nevertheless valid.

Very truly yours,

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